

0084B

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

HOWARD DORSEY,

Appellant,

v.

ISLAND COUNTY and State of
Washington DEPARTMENT OF
ECOLOGY,

Respondents.

HOWARD DORSEY and NORDIC MARINE
FLOATS OF ALASKA, INC.,

Appellants,

v.

ISLAND COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondent.

SHB No. 89-72

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER AFTER RECONSIDERATION

SHB No. 90-12

The Shorelines Hearings Board conducted a hearing on these consolidated appeals on September 5-6, 1990, in Mount Vernon, Washington. Present for the Board were Members: Judith A. Bendor, chair and presiding; Harold S. Zimmerman, Annette S. McGee, Nancy Burnett, Gordon F. Crandall and Robert C. Schofield.

Attorneys Keith Dearborn and Christopher Kane represented appellant Howard Dorsey. Appellant Nordic Marine Floats of Alaska,

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1 Inc., did not enter an appearance as a party. David Jamieson, Chief
2 Civil Deputy Prosecutor, represented Island County. Allen T. Miller,
3 Jr., Assistant Attorney General, represented the Department of
4 Ecology. Court Reporter Lettie Hyland with Evergreen Court
5 Reporting (Everett) took the proceedings.

6 Witnesses were sworn and testified. Exhibits were admitted and
7 examined. Argument was made. From the testimony and argument heard
8 and exhibits examined, the Board issued the Findings of Fact,
9 Conclusions of Law and Order on October 31, 1990.

10 On November 7, 1990, respondent Island County filed a Request for
11 Clarification of the penalty calculations. On November 9, 1990,
12 appellant Dorsey filed a Motion for Reconsideration contesting the
13 Board's dismissing appellant's appealing the County's denial a
14 shoreline substantial development permit. On November 21, 1990,
15 respondent filed its response in opposition.

16 Having considered the record, the Board corrects the penalty
17 calculations. The Board denies the Motion to Reconsider.

18 The Board hereby issues these:

19 FINDINGS OF FACT

20 I

21 In 1988, Howard Dorsey (Dorsey) engaged Nordic Marine Floats of
22 Alaska, Inc., (Nordic) to construct a floating dock over waters and
23 tidelands of Utsalady Bay, Puget Sound. On about June 9, 1988, the
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1 dock was installed adjacent to Dorsey's single-family residence on
2 north Camano Island, at 1230 North Shore Drive, in Island Conty,
3 Washington. The dock was 100 feet in length and extended from the
4 beach out beyond the line of extreme low tide into the Bay.

5 The cost of the dock, including installation, was about \$16,500.
6 Neither Dorsey nor Nordic applied for a shoreline substantial
7 development permit prior to the dock's installation, nor did either
8 inform the County about the dock. Island County is the agency with
9 initial jurisdiction for such permit.

10 II

11 In April 1989, Island County became aware of the dock, and on
12 April 19 the Planning Department advised Dorsey that construction of
13 the dock without prior approval was a violation of the Shoreline
14 Management Act and the Island County Shoreline Master Program. The
15 Planning Director suggested that Dorsey submit a site plan and
16 cross-sectional view of the dock to determine whether the dock was
17 exempt under WAC 173-124-040(h), (construction of a private dock where
18 the cost or fair market value, whichever is higher, does not exceed
19 \$2,500).

20 III

21 On July 12, 1989, Dorsey applied for a substantial development
22 permit for the existing dock. On August 1, 1989, the Planning
23 Director issued a declaration of non-significance under the State
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1 Environmental Policy Act (SEPA). On September 15, 1989, the Planning
2 Director issued his analysis and recommendation, concluding that
3 construction of the dock was contrary to the general intent, purposes,
4 goals and policies of the Island County Shoreline Master Program, and
5 recommending that the permit request be denied and that the dock be
6 removed. The permit was thereafter denied.

7 IV

8 Dorsey appealed the denial to the Island County Hearing
9 Examiner.

10 On November 1, 1990, the Hearing Examiner issued a written
11 decision affirming the denial of the shoreline substantial development
12 permit, concluding that the existing floating dock impermissibly
13 interfered with geohydraulic shoreline processes (littoral drift).
14 In all other respects the Examiner found the dock to be acceptable.
15 The denial was without prejudice to the submission of a different dock
16 design which would not interfere with littoral drift. It was
17 possible, the Hearing Examiner stated, that such a design could be
18 approved.

19 V

20 The Hearing Examiner's decision stated that Dorsey should remove
21 the illegally constructed dock within 30 days of November 1, 1989, and
22 that if it were not so removed, the Planning Director should take
23 appropriate enforcement action. Dorsey did not remove the dock as
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1 required by the Hearings Examiner's decision. On December 6, 1989, he
2 appealed the Hearings Examiner's decision to the Shoreline Hearings
3 Board. This became our appeal SHB No. 89-72.

4 VI

5 On January 29, 1990, the Board of County Commissioners and the
6 State Department of Ecology jointly issued a cease and desist order
7 and notice of civil penalty for \$15,000, jointly and severally,
8 ordering Dorsey and Nordic to remove the unauthorized floating dock
9 within fourteen days. Dorsey and Nordic appealed the penalty order to
10 the Shorelines Hearings Board, which became our SHB No. 90-12. This
11 was consolidated with the permit denial appeal, SHB No. 89-72.

12 Dorsey removed the dock on March 4, 1990, after the County
13 informed him that it would file suit in state court.

14 VII

15 On March 19, 1990, Dorsey submitted an application to the Army
16 Corps of Engineers for a permit to construct a fixed dock at the site,
17 to include a ramp, floats and piling. The Corps had previously
18 informed him, (October 30, 1989 letter), that installing a dock
19 without a Section 10 permit violated the Federal Rivers and Harbor
20 Act. Dorsey did not submit this application to Island County.

21 VIII

22 Appellant Dorsey owns his own business, a lumber mill. He has
23 extensive experience with activities which are subject to regulation.

1 Dorsey testified that it was his belief that no permits were needed
2 for the dock because it was removable. He also felt that only that
3 part of the structure located on state lands would require a permit,
4 and had estimated that this portion of the dock cost less than the
5 \$2,500 threshold required for substantial development permits.
6 Regarding whether a shoreline permit was necessary, he spoke with a
7 friend at the Port of Everett, friends at the Department of Natural
8 Resources and with Roland Halvorson of Nordic, but did not consult
9 with Island County, the Department of Ecology or the Corps of
10 Engineers.

11 Dorsey testified that he refused to remove the dock by December
12 1, 1989, as ordered by the Hearing Examiner, because he felt that an
13 appeal to the Shorelines Hearings Board would suspend the operation of
14 the order. He said that legal counsel told him that he could leave
15 the dock in place.

16 No legal authority to support these contentions has been supplied
17 to the Board.

18 Overall, we find that Dorsey's efforts to determine whether a
19 permit was required, did not demonstrate good faith or conscientious
20 efforts.

21 IX

22 Nordic's president testified at the hearing. Nordic is in the
23 business of constructing docks in Washington State and elsewhere.
24 Nordic made no effort to determine whether a shoreline permit was
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1 required, and relied on their client, Mr. Dorsey, to make the
2 determination.

3 X

4 In this appeal, Dorsey asks the Shorelines Hearings Board to
5 approve a fixed dock in the design submitted to the Corps of
6 Engineers. (Ex. A-18)

7 Dorsey has granted joint-use dock rights to thirteen boaters from
8 outside the immediate area, and testified that neighboring property
9 owners would be offered the same privilege, (i.e., on a personal
10 basis, not a recorded real property interest).

11 XI

12 At the conclusion of appellant Dorsey's case before this Board,
13 Island County moved for a "directed verdict", that is, to deny the
14 appeal and affirm the County's denial fo the permit. SHB No. 89-72.
15 The County argued that Dorsey's proposal at the hearing substantially
16 differed from the dock the County had denied, and that the proper
17 course for Dorsey was to submit a new application to Island County,
18 and not have the matter decided by the Shorelines Hearings Board.

19 After conferring, the Board orally granted the motion.

20 XII

21 We found then, and now affirm here, that the proposed fixed pier
22 constitutes a substantially different project from the floating pier
23 that had been built, placed on site and subsequently reviewed by the
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1 County. A fixed pier is elevated; a floating pier moves up and down
2 with the tide and "bottoms out" on the tidelands. The impacts on
3 littoral drift and aesthetics are more likely than not to be
4 significantly different. The fixed pier has also not undergone a
5 County permit application review or a SEPA review.

6 XIII

7 Any Conclusion of Law deemed to be a Finding of Fact is hereby
8 adopted as such. From these Findings of Fact, the Board makes the
9 following:

10 CONCLUSIONS OF LAW

11 I

12 The Board has jurisdiction over the parties and the subject
13 matter of these appeals. RCW 90.58.180 and .210.

14 II

15 The Board reviews a proposal for a substantial development permit
16 for consistency with the Island County Shorelines Master Program (SMP)
17 and the Shoreline Management Act (SMA). Chapt. 90.58 RCW; WAC
18 461-08-175.

19 III

20 The Board reviews a penalty imposed by government, in accordance
21 with RCW 90.58.210 and Chapt. 173-17 WAC. If liability is found, the
22 severity of a shoreline penalty is reviewed based upon several
23 factors, including: 1) the nature and extent of the violation,
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1 including any damage or risk to the public or to public resources; 2)
2 the need to promote compliance with the law; 3) whether the persons
3 took steps to mitigate their actions after being informed of
4 illegality and prior to the issuance of a penalty order; and 4)
5 whether there have been prior violations.

6 IV

7 RCW 90.58.180(1) provides that any person aggrieved by the
8 granting, denying, or rescinding of a permit on shorelines of the
9 state, pursuant to RCW 90.58.140 may seek review from the Shorelines
10 Hearings Board. The Board makes its decision by considering:

11 (c) . . . whether the action of the local government
12 unit is consistent with the applicable master program
13 and the provisions of chapter 90.58 RCW. WAC
461-08-175.

14 SEPA review at the local level is a required part of the process.
15 Here the County denied a permit for a floating pier, and has
16 never been asked to decide whether a fixed pier would be permitted.
17 This Board cannot usurp the County's authority by ruling in the first
18 instance on Dorsey's proposal for a fixed pier. The Board's authority
19 is limited to review of the County's action. WAC 461-08-175(c). The
20 proposal presented to the Board is substantially different from the
21 original floating pier presented to the County.

22 The Board's oral ruling at the hearing, on the County's motion at
23 the end of Dorsey's case was correct. To do otherwise would
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1 impermissibly thwart the local review process, including the SEPA
2 requirements.

3 The Board's oral ruling affirming the County on appeal SHB 89-72,
4 is hereby confirmed.

5 V

6 The maximum penalty is \$1,000 per violation, with each day
7 constituting a separate violation. WAC 173-17-050(1). The \$15,000
8 penalty imposed was less than the maximum.

9 A permit was clearly required and thus liability exists.
10 Further, the Board concludes that penalties should be imposed upon
11 both Dorsey and Nordic. However, as the following will detail, some
12 mitigation of the \$15,000 is appropriate.

13 Overall, we conclude that a \$1,000 penalty for Nordic, and a
14 \$12,175 penalty for Dorsey (\$3,500 due and \$8,675 suspended for three
15 years) is appropriate. Our reasoning is as follows:

16 Nordic and Dorsey were each equally culpable for installing the
17 dock without a permit and \$1,000 each is proper.

18 After observing Nordic's president's demeanor during testimony,
19 we are convinced that Nordic's \$1,000 penalty is sufficient to serve
20 as a deterrent.

21 Dorsey enjoyed the use of the dock, the fruit of his unlawful
22 conduct, for almost two years. Dorsey could have removed the dock at
23 anytime, with a minimal effort. He refused to do so.

1 We conclude that additionally, as to Dorsey, the penalty of \$25
2 per day as set by the County, is appropriate for the period from
3 installation on June 9, 1988 to April 19, 1989 (314 days), equalling
4 \$7,850. From April 19, 1989 until November 30, 1989, we conclude that
5 the County's statements reasonably gave Dorsey the impression that
6 removal of the dock was not required during the permit application
7 process. Therefore, mitigation of the penalty for this period is
8 appropriate. However, Dorsey proceeded at his own risk not to obey
9 the Hearings Examiner's order to remove the pier by December 1, 1989.
10 Therefore, a penalty from December 1, 1989 until March 4, 1990 (93
11 days) at the same \$25/day, equalling \$2,325, is appropriate. The
12 total Dorsey penalty is, therefore, \$11,175.

13 We further conclude that as to appellant Dorsey, the sum of
14 \$3,500 is due upon the issuance of this decision, and the sum of
15 \$7,675 is suspended on the condition that he does not violate the
16 Washington Shoreline Management Act, any Shoreline Master Program, or
17 any shoreline regulations for a period of three years from the date of
18 this Order. This is Dorsey's first offense, and this should have the
19 appropriate deterrent effect.

20 Nothing herein shall preclude either Nordic or Dorsey from
21 submitting applications for shorelines substantial development permits
22 at this or other locations.

23 VI

24 Any Finding of Fact deemed to be a Conclusion of Law is hereby
25 adopted as such. From these Conclusions of law, the Board enters this:

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ORDER

The appeal of Howard Dorsey from the denial of a substantial development permit for construction of a floating dock at 1230 North Shore Drive, Camano Island, WA, (SHB No. 89-72), is DISMISSED.

The penalties assessed by Island County to Howard Dorsey and Nordic Marine Floats of Alaska, Inc., are AFFIRMED as to liability, with the \$15,000 penalty MITIGATED to be: \$1,000 due as to Nordic Marine. \$11,175 assessed as to Howard Dorsey, with \$3,500 DUE, and \$7,850 SUSPENDED provided that he complies with the Shoreline Management Act and implementing regulations including local Shoreline Master Programs for three years.

DONE this 7th day of December, 1990.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Annette S. McGee
ANNETTE S. MCGEE, Member

Nancy Burnett
NANCY BURNETT, Member

Gordon F. Crandall [by JB]
GORDON F. CRANDALL, Member

[Not available for signature]
Robert C. Schofield, Member